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No. 08-838

IN THE
SUPREME COURT OF THE UNITED STATES

NAVEEN JAIN AND ANURADHA JAIN,
Petitioners,

v.

J.P. MORGAN SECURITIES, INC.,
WILSON SONSINI GOODRICH & ROSATI, P.C.,
AND PERKINS COIE, LLP,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

RESPONDENT WILSON SONSINI GOODRICH & ROSATI, P.C.'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are the Circuit Courts in conflict as to whether a party found to have violated § 16(b) of the Securities & Exchange Act of 1934, 15 U.S.C. § 78p(b), may pursue indemnity claims to recover disgorged profits, when every court to address the question has refused to allow such claims?

2. Are the Circuit Courts in conflict regarding how to determine whether a securities law violator's state common law claim is a disguised or de facto indemnity claim, when each Circuit Court to address the issue has focused on what alleged damages are at issue?

CORPORATE DISCLOSURE STATEMENT

In accordance with SUP. CT. R. 29.6, respondent Wilson Sonsini Goodrich & Rosati, P.C. states that no parent or publicly held company owns ten percent or more of its stock.

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INTRODUCTION

In 2003, the United States District Court, Western District of Washington, ordered Petitioners Naveen and Anuradha Jain to disgorge over $200 million in profits garnered from their "short-swing" insider trading of InfoSpace stock. In so doing, the District Court likely erred, particularly in its damages analysis, but Petitioners Naveen and Anuradha Jain did not allow the Ninth Circuit Court of Appeals to so rule. Instead, they abandoned their appeal and sought indemnity from two law firms, respondents Wilson Sonsini Goodrich & Rosati, P.C. ("Wilson") and Perkins Coie, LLP ("Perkins"), and an investment firm, respondent J. P. Morgan Securities, Inc. ("Morgan"). Applying the well-settled rule barring indemnity for securities law violators, the King County Superior Court for the State of Washington dismissed the indemnity claims. The Jains filed amended complaints that no longer expressly sought indemnity, but still sought damages resulting from the insider trading judgment. The Superior Court dismissed the Jains' complaints with prejudice because the no-indemnity-for-securities-violators rule barred the Jains' de facto claims and, alternatively, because the Jains could not establish proximate cause. The Jains appealed. Relying on the no-indemnity-for-securities-violators rule, the Washington State Court of Appeals affirmed the Superior Court's decision. The Jains petitioned for review by the Washington State Supreme Court, which denied their petition.

The Jains allege that conflicts among the Circuit Courts regarding indemnity for securities law violators warrants certiorari. There are no

conflicts among the Circuit Courts, particularly on the narrow issue presented by this case. For this reason, and because the Jains' claims also fail for lack of proximate cause, respondent Wilson respectfully submits that certiorari is not warranted.

COUNTERSTATEMENT OF THE CASE

I. The District Court's Section 16(b) Rulings

Section 16(b) of the Securities & Exchange Act of 1934, 15 U.S.C. § 78p(b) ("section 16(b)") combats the possibility of unfair trading by requiring insiders who engage in short-swing trading, i.e., buying and selling company stock within a six-month period, to disgorge all resulting profits to the company. Section 16(b) is a strict liability provision that requires profit disgorgement whether or not the corporate insider acted with unlawful intent. The Jains violated section 16(b). They claim they did so unwittingly, but the District Court found otherwise. Thus, the District Court rejected the Jains' claim their section 16(b) violation was not voluntary and therefore not actionable, stating:

> The Jains signed papers allowing transfer of funds from [estate-related trusts]. The Jains caused deposits of trust stock into their personal brokerage accounts by forwarding stock certificates to their personal broker. Mr. Jain promised to place shares of the NJGRAT trust into escrow to fulfill a personal obligation. The fact that the Jains failed to read their brokerage statements, simply signed legal documents without knowing what they were, and mistakenly sent certificates

> to their personal broker does not make their actions involuntary....[T]he Jains participated in the transfers and retained more than a degree of control over the transactions. Without the participation of the Jains, the transfers would not have happened.

Pet. A-76 to A-77. The Court's analysis was consistent with Washington state law charging parties with knowledge of the contents of the documents they sign. *E.g., Skagit State Bank v. Rasmussen,* 109 Wash. 2d 377, 381-82, 745 P.2d 37, 39-40 (1987). In this case, those documents included an initial public offering statement for InfoSpace stock, multiple filings with the United States Securities & Exchange Commission ("SEC"), and documents authorizing the deposit of InfoSpace shares issued to estate-related trusts into the Jains' personal accounts.

The District Court ordered the Jains to disgorge $202,551,696.05 in profits realized from the unlawful stock transactions, plus $44,571,016.92 in prejudgment interest, to InfoSpace. Pet. A-50 to A-58. In calculating the Jains' profit, the District Court assigned a purchase price of zero to the shares at issue, including shares the Jains had acquired through a two-for-one stock split. *Id.*

II. The Jains' Post-Judgment Appeal and Pursuit of Indemnity Claims

The Jains reacted to entry of the section 16(b) judgment by filing a state court declaratory judgment action against Morgan and several other defendants, but not Wilson or Perkins. Morgan and the other defendants removed the Jains' lawsuit.

The District Court remanded the suit to the King County Superior Court for the State of Washington. Pet. A-31 to A-43. Neither Wilson nor Perkins was a party to that order, another fact the Jains omit from their Petition.

The Jains also appealed the District Court's adverse section 16(b) rulings to the Ninth Circuit Court of Appeals. To ensure proper construction of section 16(b), the SEC filed an amicus brief on the Jains' behalf, yet another fact the Jains do not mention. The SEC found fault with both the District Court's application of section 16(b) to the Jains' circumstances and its profit and purchase price analysis. Thus it argued that: (1) the Jains received no profit from the transactions; (2) rather than using a purchase price of zero, the District Court should have assigned a purchase price equal to the market value of InfoSpace stock on the date the Jains acquired the shares; and (3) the Jains' stock acquisitions were subject to a statutory exemption for shares acquired by a stock split. Had the Ninth Circuit accepted the SEC's arguments,[1] the Jains would have fully prevailed on appeal or benefited from a drastically reduced judgment.

Despite enjoying the SEC's support, the Jains abandoned their appeal and entered into a global settlement of the section 16(b) lawsuit and several other pending actions, including InfoSpace's claims

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[1] The Ninth Circuit would have deferred to, or at least given serious consideration to, the SEC's analysis. *E.g., Auer v. Robbins,* 519 U.S. 452, 461-62, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

against the Jains and the Jains' claims against various insurers. Among other things, the settlement required the Jains to pay InfoSpace $68 million. For undisclosed reasons, the settling parties allocated all but $3 million of the Jains' $68 million payment to the section 16(b) suit. Perhaps not coincidentally, by then the Jains were pursuing indemnity claims to recover their disgorged section 16(b) profits.

After the District Court remanded their suit against Morgan, the Jains amended their complaint to add Wilson as a defendant and to, for the first time, assert express indemnity claims seeking recovery of their disgorged profits and the attorneys' fees they incurred defending against the section 16(b) action. The Jains also began pursuing a separate lawsuit against Perkins. Once the global settlement ended appeal-related stays of these two actions, the Jains filed another round of amended complaints deleting most defendants and asserting or reasserting their express indemnity causes of action. Wilson, Perkins and Morgan all sought dismissal under the rule that indemnity is not available to securities law violators. The Superior Court granted the motions without prejudice to the Jains' right to amend. The Jains' Petition makes no mention of this series of events.

The Jains responded by filing a second amended complaint against Perkins and a third amended complaint against Wilson and Morgan. Those complaints no longer expressly sought indemnity for the Jains' section 16(b) liability, but did so in fact. Wilson, Perkins and Morgan again moved for dismissal. Wilson's motion emphasized

that the Jains still sought damages resulting from their section 16(b) liability and thus the no-indemnity-for-securities-violators rule barred their de facto indemnity claims. Wilson alternatively argued that if, as the Jains claimed, the District Court erred in finding they violated section 16(b) and they in fact were not securities law violators, then the Jains could not establish that Wilson's alleged acts or omissions proximately caused damage to them. Simply put, Wilson's alleged wrongdoing involved the transactions that gave rise to the Jains' alleged section 16(b) liability, not the Jains' defense of the section 16(b) lawsuit. Accordingly, if as the Jains claimed, they did not violate section 16(b), then Wilson obviously could not have caused them to violate that provision. Wilson also pointed out that under Washington law it was significant to the proximate cause analysis that the Jains abandoned their appeal. *E.g., Paradise Orchards Gen. P'ship v. Fearing,* 122 Wash. App. 507, 94 P.3d 372 (2004); *E.g., Nielson v. Eisenhower & Carlson,* 100 Wash. App. 584, 999 P.2d 42 (2000). The Superior Court agreed with all of Wilson's arguments as well as similar arguments made by Perkins and Morgan. It also found that the Ninth Circuit Court of Appeals would have at least partially reversed the District Court's liability determination and would have rejected its damage calculation. The Superior Court then entered orders dismissing the Jains' complaints with prejudice. Pet. A-19 to A-30.

The Jains appealed and the Washington State Court of Appeals affirmed. As had the Superior Court, the Court of Appeals concluded the Jains were asserting de facto or disguised indemnity

claims and the no-indemnity-for-securities-violators rule therefore barred their lawsuits. Pet. A-3 to A-18. The Washington Supreme Court declined to review that decision. Pet. A-1 to A-2.

REASONS TO DENY THE PETITION FOR CERTIORARI

I. Summary of Reasons for Denying Certiorari

The Jains seek a writ of certiorari based on an assertion that "[t]he Circuits are divided on whether and to what extent the Securities Exchange Act of 1934" bars de facto indemnity claims brought by securities law violators against negligent securities professionals. Pet. 4. The conflicts the Jains try to demonstrate do not exist. Every court to address the question has ruled that section 16(b) violators cannot obtain indemnity from anyone, including negligent securities professionals. Every court that has decided whether indemnity is available to those who violate other strict liability provisions of the securities laws has reached the same conclusion. The Circuit Courts agree that whether a state law claim is in fact a disguised or de facto indemnity claim is determined not by the presence of independent claims or the identity of the defendant, but by whether the injured party can assert damages independent of those resulting from the securities violation. The Washington courts adhered to these rules in disallowing the Jains' claims. No conflict among the circuits exists and this case does not warrant Supreme Court review on that basis.

Recognizing this, the Jains' Petition focuses less on showing a conflict than on trying to persuade

the Court it should allow indemnity to "innocent" securities law violators such as they claim to be. Pet. 15-17. To that end, the Jains claim federal courts treat innocent or negligent securities law violators inconsistently. That is not the case. Every Circuit Court addressing a situation in which the party seeking indemnity violated a law imposing liability for negligent or even innocent conduct has refused to allow indemnity. Courts referencing reckless or intentional conduct when analyzing indemnity claims do so only in the context of securities laws for which liability requires scienter.

The Jains' arguments fail to recognize that the key consideration is whether the indemnity-seeker violated the relevant provision of the securities laws. If he or she did, indemnity is not allowed. As the author of the treatise upon which the Jains rely in their "Circuits Are Split" argument explained (in language the Jains omit from their quote on page 18 of the Petition):

> Despite these discrepancies, most of these cases share a common result: whatever rationale or standard the court uses, it generally denies the claim for indemnification. The reasons for this common outcome are straightforward. In the cases under discussion, the defendants seeking indemnification had been held to have violated provisions of the federal securities laws.

Deborah A. DeMott, *Shareholder Derivative Actions Law & Practice* § 6:43 (2008) (footnote omitted).

Indemnity is particularly inappropriate for those who, like the Jains, are subject to a profit disgorgement remedy. The purpose of disgorgement is not to compensate others, but to force a defendant to give up the amount by which he or she was unjustly enriched. *E.g., SEC v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978). To allow indemnification would render that remedy ineffectual. Indeed, Congress made section 16(b) a strict liability-profit disgorgement provision because the only effective way to curb insider trading is "a flat rule taking the profits out of a class of transactions in which the possibility of abuse was ... intolerably great," and by barring any approach requiring "a judicial search for the will-o'-the wisp of an investor's 'intent'[.]" *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422, 425, 92 S. Ct. 596, 30 L. Ed. 2d 575 (1972).

The rule against indemnity applied here conforms to the SEC's long-standing policy against indemnity. Over twenty-five years ago, the agency adopted rules stating in relevant part that, in the SEC's opinion, "indemnification is against public policy as expressed in the [Securities] Act and is therefore unenforceable." 17 C.F.R. § 229.510 (2008) (47 Fed. Reg. 11401 (Mar. 16, 1982)); *accord* 17 C.F.R. § 230.484 (2008) (47 Fed. Reg. 11448 (Mar. 16, 1982)). With their Petition, the Jains ask the Court to ignore that expression of policy because it can lead to harsh results. The Court should reject that request. Any harshness suffered by the Jains resulted not from application of the no-indemnity rule, but from the District Court's erroneous damage and liability analyses. As the SEC made clear, the

Jains should not have had to disgorge any amount to InfoSpace. But rather than allowing the Ninth Circuit to so rule, the Jains chose to abandon their appeal and pursue long-prohibited express indemnity claims. While that decision had unfortunate results for the Jains, their unique situation does not result from any misapplication of indemnity law or unduly harsh anti-indemnity policy, nor does it demonstrate a conflict among the Circuit Courts.

II. The Court Should Deny Certiorari Because Federal Courts Uniformly Bar Indemnity for Section 16(b) Violators

The Circuit Courts agree that those who violate the securities laws cannot obtain indemnity. *See, e.g., Eichenholtz v. Brennan*, 52 F.3d 478, 483-86 (3d Cir. 1995); *First Golden Bancorporation v. Weiszmann*, 942 F.2d 726, 728-29 (10th Cir. 1991); *King v. Gibbs*, 876 F.2d 1275, 1279-83 (7th Cir. 1989); *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1108 (4th Cir. 1989); *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672, 676 (9th Cir. 1980). The Courts do not allow indemnity because (1) the securities laws do not provide a right to indemnification; and (2) to allow that remedy would "undermine the statutory purpose of assuring diligent performance of duty and deterring negligence." *Laventhol, Krekstein*, 637 F.2d at 676; *accord Eichenholtz*, 52 F.3d at 484 ("underlying goal of securities legislation is encouraging diligence and discouraging negligence in securities transactions"); *First Golden*, 942 F.2d at 728-29 (noting Congress's deterrence goal in enacting the 1933 and 1934 securities laws); *Baker*,

Watts, 876 F.2d at 1105 ("a right of action for indemnification would frustrate the [1933 Act's] goal of encouraging diligence and discouraging negligence in securities transactions"); *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288-89 (2d Cir. 1969) (civil liability under securities laws promotes enforcement and deters negligence, goals that could be thwarted if securities violators were indemnified).

An additional policy concern comes into play when, as here, the party seeking indemnification violated section 16(b). As every federal court to address the issue has recognized, to allow indemnification in a section 16(b) case would render ineffective the prophylactic, profit-stripping remedy created by Congress because it would allow the violator to recover his or her disgorged profits. *First Golden*, 942 F.2d at 728-29 ("the public policy behind section 16(b) renders invalid any attempt by an insider to seek indemnification"); *Deephaven Capital Mgmt., LLC v. Schnell*, 2007 U.S. Dist. LEXIS 1504, 2007 WL 101821, *2-4 (D. Minn. Jan. 8, 2007) (allowing indemnification to a section 16(b) violator would undermine deterrence policy because violator would effectively recoup disgorged profits); *Schaffer ex rel. Lasersight, Inc. v. C.C. Invs., LDC*, 286 F. Supp. 2d 279, 282-83 & n.6 (S.D.N.Y. 2003) (allowing indemnification would frustrate public policy because section 16(b) violators would not have to return short-swing profits); *Bunker Ramo-Eltra Corp. v. Fairchild Indus., Inc.*, 639 F. Supp. 409, 418-19 (D. Md. 1986) (indemnity claim was attempt to retain profits resulting from section 16(b) violation); *see also In re XO Commc'ns, Inc.*, 330 B.R. 394, 441 (S.D.N.Y. 2005) (citing *Schaffer* with

approval). The appeals court in this case reached the same conclusion, holding that "an insider found to have violated section 16(b) may not seek indemnification for the ensuing liability. This is to prevent an insider from effectively waiving the requirement that short-swing profits be returned, thus frustrating the policy behind section 16(b)." *Jain v. J.P. Morgan Secs., Inc.*, 142 Wn. App. 574, 582, 177 P.3d 117, 121 (2008) (Pet. A-10), *review denied*, 164 Wn.2d 1022, 196 P.3d 135 (2008).

The Jains nevertheless imply that the scope of the indemnity bar for section 16(b) violators is unsettled because some courts have limited the bar to situations in which the section 16(b) violator sought indemnity from the entity to which the violator disgorged illicit profits. *See* Pet. 25. That is not the case. No court allows indemnity to 16(b) violators – whether the potential indemnitor is a third party such as an accountant or lawyer, or the stock issuing entity. Thus the *First Golden* court rejected indemnity claims brought by a section 16(b) violator against its financial advisor. 942 F.2d at 728. Similarly, in *Deephaven* (a case the Jains fail to cite) the court disallowed a section 16(b) violator's indemnity claims against its portfolio manager. 2007 WL 101821 at *1; *see also Jain*, 142 Wn. App. at 582, 177 P.3d at 121 (Pet. A-10). In all of these cases, the court recognized that in order to maintain the prophylactic profit-stripping remedy of section 16(b), the no-indemnity rule must be enforced.

The Jains appear to suggest that *Bunker Ramo-Eltra*, *Schaffer*, and *In re XO Communications* applied a more limited anti-indemnification rule,

specifically, one that only bars indemnification by the stock-issuing entity. Pet. 25 n.4. The Jains misconstrue the significance of those cases, as none involved an attempt to obtain indemnity from a third party or even mentioned such a scenario. Moreover, in each of those cases, the court expressly acknowledged that to allow indemnity to a section 16(b) violator would eviscerate the provision's profit-stripping remedy and thus contravene public policy. That concern is not dependent in any way on the identity of the party from whom the section 16(b) violator seeks indemnity.

In *Bunker Ramo-Eltra,* for example, the section 16(b) violator sought to enforce an indemnification clause in a stock purchase agreement. The court concluded it would violate public policy to allow indemnification not because of the identity of the proposed indemnitor, but because "defendants ... are trying to retain profits which resulted from their improper actions which did violate section 16(a) as well as the public policy underlying that section of the Exchange Act." *Bunker Ramo-Eltra,* 639 F. Supp. at 418. In *Schaffer,* the court allowed a section 16(b) action to proceed despite the share-issuing corporation's bankruptcy stay, because the suit could benefit creditors by making insiders "disgorge illicit profits" to the corporation. 286 F. Supp. 2d at 282-83. The *In re XO* court similarly recognized that bankruptcy proceedings have no effect on the profit-stripping remedy of a section 16(b) suit. 330 B.R. at 421, 441.

In short, as this Court has long recognized, removing any chance of retaining illicit profits is the most effective way to curb the evils of insider

trading. *Foremost-McKesson, Inc. v. Provident Secs. Co.*, 423 U.S. 232, 243-44, 251, 96 S. Ct. 508, 46 L. Ed. 2d 464 (1976); *Reliance Elec. Co.*, 404 U.S. at 422. Every court to address the question has concluded that to allow any form of indemnity to a section 16(b) violator would undermine achievement of that important goal. The resultant uniformity of results and certainty of outcome are, by themselves, reason to deny the Jains' Petition for Writ of Certiorari.

III. The Court Should Deny Certiorari Because the Circuit Courts Apply Uniform Legal Standards to Indemnity Claims Brought by Securities Law Violators

A. All Circuit Courts Use a Damages-Based Analysis to Identify De Facto or Disguised Indemnity Claims

Despite the lack of any authority allowing indemnity to those who violate section 16(b), the Jains claim clarification is needed regarding whether section 16(b) violators can seek indemnity from "securities professionals" whose negligence allegedly caused the section 16(b) violation. To that end, the Jains claim the Circuit Courts disagree on the extent to which securities violators can pursue "independent" state law claims to recover the illicit profits they were compelled to disgorge. *See* Pet. i, 4. The Jains' assertions notwithstanding, there is no such disagreement. Rather, the Circuit Courts agree that: (1) the anti-indemnity rule does not bar independent state law claims that do not seek indemnity; and (2) the way to distinguish claims

seeking indemnity from claims that are truly independent is to look at the damages in issue.

The most recent Circuit Court decision to so hold is *In re Heritage Bond Litigation*, 546 F.3d 667 (9th Cir. 2008), a case the Jains do not cite.[2] In *Heritage*, the court considered the extent to which a Private Securities Litigation Reform Act bar order could preclude state law claims. The court held that bar orders cannot preclude independent, non-indemnity or non-contribution state law claims, but must bar state law claims asserting as "the injury ... the non-settling defendant's liability to the plaintiff[.]" 546 F.3d at 679. Claims seeking such damages are de facto or disguised indemnity claims and thus are properly barred. 546 F.3d at 677-80.

The Ninth Circuit relied heavily on *Gerber v. MTC Electronic Technologies Co.*, 329 F.3d 297 (2d Cir. 2003), another case the Jains do not cite. In *Gerber*, the Second Circuit likewise held that bar orders in securities cases can properly extinguish "any claims in which the injury is the nonsettling defendant's liability to the plaintiff." 329 F.3d at 306. As the *Gerber* court succinctly explained: "The issue, in other words, is less one of independent 'claims' than independent 'damages.'" 329 F.3d at 307; *accord Heritage*, 546 F.3d at 679.

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[2] *Heritage* effectively rejects the duty-based disguised indemnity claim analysis described by the District Court in this case and quoted by the Jains in their Petition. Pet. 11-12, A-41. The Jains' reliance on the District Court's remand order is therefore misplaced not only because the District Court's analysis was dicta set forth in an order entered without the benefit of briefing by Wilson or Perkins, but also because it is contrary to Ninth Circuit law.

The Ninth Circuit also cited decisions from the Eleventh Circuit, specifically *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305 (11th Cir. 2004), and *In re U.S. Oil & Gas Litigation*, 967 F.2d 489 (11th Cir. 1992). The *Heritage* court noted that some courts had interpreted the Eleventh Circuit's earlier decision, *In re U.S. Oil & Gas*, as holding that whether a claim is independent turns on whether it involves different facts. *Heritage*, 546 F.3d at 678. In *AAL*, however, the Eleventh Circuit made clear that the claims at issue in *U.S. Oil & Gas* lacked the requisite independence because they sought damages co-extensive with federal securities law liability, not because they arose from the same set of facts. *AAL*, 361 F.3d at 1312; *see also Heritage*, 546 F.3d at 678-79.

The Tenth Circuit Court Appeals has long used the damages-based analysis more recently employed by the Third, Ninth and Eleventh Circuits to identify disguised indemnity claims. In *First Golden*, the Tenth Circuit analyzed whether the claims at issue were de facto indemnity claims by examining whether the damages sought were measured by the underlying securities liability. 942 F.2d at 731-32. To the extent the claims, however denominated, were in fact "liability over" claims (that is, claims that sought to recover as damages the amount of underlying securities liability), they were appropriately dismissed with prejudice. *Id.*

The Fourth Circuit Court of Appeals is also in accord. In *Baker Watts*, the court held that "[t]o the extent ... plaintiff's pendent state actions are claims for indemnification, they must fail as preempted by federal law [because] Congress has not provided a

right to indemnification in the federal securities laws under any circumstances." 876 F.2d at 1108. The court then indicated that state law claims are indemnity claims when a securities law violator is attempting to shift responsibility for its federal violations onto another. *Id.*

The Washington courts used this approach in concluding that the Jains' state law claims sought de facto indemnification. *See Jain*, 142 Wash. App. at 582-85, 177 P.3d at 121-23 (Pet. A-10 to A-14). Citing *First Golden*, the Washington State Court of Appeals thus held that "to whatever extent funds recovered under a state tort claim are comparable to the funds disgorged under section 16(b), they must be barred as de facto indemnification." *Jain*, 142 Wash. App. at 585, 177 P.3d at 123 (Pet. A-14). Because the Jains' state law claims sought such damages, they were barred. 142 Wash. App. at 586-87, 177 P.3d at 123 (Pet. A-16). In so holding, the Washington Court followed well-settled law governing identification of de facto indemnity claims and committed no error.

In sum, there is no conflict among the Circuit Courts with respect to distinguishing between independent state law claims and de facto indemnity claims. The Circuit Courts agree that the prohibition against indemnity for securities law violators extends to state law claims that are disguised or de facto claims for indemnity, no matter who the defendant or what the name of the claim. The Courts also agree that the way to identify a disguised or de facto indemnity claim is to look at the damages in issue. This consistent approach ensures uniform application of the anti-indemnity

bar and adherence to the profit-stripping remedy of section 16(b). For these reasons, too, the Court should deny the Jains' Petition for Writ of Certiorari.

B. There is No Disagreement Among the Circuit Courts About Whether to Limit the Anti-Indemnity Rule to Intentional or Reckless Violators of the Securities Laws

The Jains also urge the Court to grant certiorari to decide whether the anti-indemnity rule should be limited to cases involving reckless, willful or intentional violations of the securities laws. To that end, the Jains cite several cases that they claim show disagreement among the Circuits about whether innocent or negligent securities law violators should be denied indemnity. Again, the Jains' attempt to show a conflict fails. Put simply, the differences the Jains emphasize stem from whether or not the party seeking indemnity actually violated the securities law provision in issue, not from whether he, she, or it acted with a particular mental state.

To reiterate, every court to address indemnity in the context of a section 16(b) violator has refused to allow indemnity. *See supra* at 10-14. The same is true when violations of other strict liability or negligence-based civil liability provisions of the securities laws are at issue. *Baker, Watts,* for example, involved a partnership found liable under section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(a)(2), for unintentionally making material omissions in an offering memorandum. 876 F.2d at 1102-03. The partnership sought indemnity from a

law firm that assisted with the offering. *Id.* The Fourth Circuit Court of Appeals held that under no circumstances did the partnership have a right to indemnification. *Id.*, 876 F.2d at 1108. Similarly, *Eichenholtz* involved allegations that defendants violated section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, a provision imposing liability for false statements or material omissions in registration statements. 52 F.3d at 480, 483. Section 11, like section 16(b) and section 12(2), has no scienter requirement. Despite claims by the parties seeking indemnity that they were merely negligent and played a "*de minimis*" role in the public offering at issue, the Third Circuit Court of Appeals upheld a bar order precluding indemnity claims. 52 F.3d at 484-85. The Ninth Circuit Court of Appeals has reached the same result in section 11 cases. *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1232 (9th Cir. 1989).

Ignoring these holdings, the Jains focus on cases in which a Circuit Court mentioned the would-be indemnitee's fraud, willfulness, or other form of scienter, and claim those cases show disagreement among the Circuits about whether the indemnity bar should be limited to cases involving scienter. But the Circuit Court decisions upon which the Jains seemingly rely involved violations of securities laws for which proof of scienter is required, i.e., provisions such as Rule 10b-5, 17 C.F.R. § 240.10b-5 (2008), and section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b). *E.g., King v. Gibbs,* 876 F.2d 1275, 1276 (7th Cir. 1989); *Heizer Corp. v. Ross,* 601 F.2d 330, 331 (7th Cir. 1979); *Globus v. Law Research Serv., Inc.,* 418 F.2d 1275 (2d Cir. 1969).

Since under those provisions there ordinarily is no securities law violation (and thus no bar to indemnity) without proof of fault, the courts necessarily discuss mental state. That they do so in the context of a scienter-based violation does not mean, however, that those courts would allow indemnity to a section 16(b) violator subject to a profit disgorgement remedy – a remedy based on unique policies inapposite to those at issue in *King*, *Heizer*, and *Globus*.

Petitioners also cite district court decisions involving indemnity claims brought by those whose status as a securities law violator has not been adjudicated due to a pre-trial settlement or because the case is in a very early stage. *E.g.*, *Fromer v. Yogel*, 50 F. Supp. 2d 227 (S.D.N.Y. 1999); *Greenwald v. Am. Medcare Corp.*, 666 F. Supp. 489 (S.D.N.Y. 1987); *Arden Way Assocs. v. Boesky*, 664 F. Supp. 863 (S.D.N.Y. 1987). Because those cases do not involve a securities law violator, they are inapposite. In fact, the same district court that issued those decisions has also recognized there is no indemnity for those who, like the Jains, are found to have violated section 16(b). *Schaffer*, 286 F. Supp. 2d at 282-83 & n.6 (citing *First Golden*, 942 F.2d at 729).

C. The Court Should Deny Certiorari Because the Jains Seek a Change in the Law That Would Contravene Public Policy

The final section of the Jains' petition urges the Court to abandon the profit-stripping remedy of section 16(b) so that those found to have violated the

provision can recover their disgorged illicit profits from others. The Jains cite no authority supporting that request, nor do they acknowledge that allowing indemnity to section 16(b) violators would eviscerate the purpose of that statute: to curb insider trading by removing any chance that illicit profits might be retained. *Foremost-McKesson,* 423 U.S. at 243-44; *Reliance,* 404 U.S. at 422.

There is nothing harsh or unfair about the remedy of disgorgement; it simply forces a defendant to give up the amount by which he or she was unjustly enriched. *SEC v. Commonwealth Chem.,* 574 F.2d at 102. It does not impose damages or deprive the insider of the long-term investment value of his or her stocks, it simply takes away profits the insider had no right to receive. *Id.* While in this case the District Court miscalculated those profits by a substantial margin, the Jains' remedy for that error lay with the Ninth Circuit Court of Appeals. That the Jains instead chose to pursue prohibited indemnity claims is no reason for this Court to set aside well-settled law, contravene the SEC's express anti-indemnity policy, and undermine the purposes and effectiveness of the disgorgement remedy for section 16(b) violators.

Indeed, to grant the Jains the ruling they seek could lead to unintentional and unintended results and lead to a quagmire of fault and intent-based inquiries. For example, under the Jains' approach an unscrupulous insider who knows her planned transactions violate section 16(b) could obtain indemnity from any professional who happens to give mistaken advice about the transactions' legality.

Such a result would strip section 16(b) of its effectiveness.

CONCLUSION

The Jains' Petition for Writ of Certiorari urges the Court to find conflicts where none exist and to abandon an anti-indemnity policy that has held firm for over 25 years. Because the Jains have failed to articulate a basis for granting certiorari, and the relief they seek is contrary to public policy, and for the additional reasons stated herein and in the oppositions filed by Morgan and Perkins, Wilson respectfully asks the Court to deny the Petition.

Respectfully Submitted,

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